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In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE, PETITIONER

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether Congress has waived the federal government's sovereign immunity against awards of money damages for violations of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, which prohibits, inter alia, discrimination on the basis of disability "under any program or activity conducted by any Executive agency." 29 U.S.C. 794(a) (Supp. V 1993).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Summary of argument	7
Argument:	
Congress has not waived the federal government's sovereign immunity against awards of money damages for violations of Section 504(a) of the Rehabilitation Act of 1973	10
A. The Rehabilitation Act does not provide the unequivocal statutory statement required to accomplish a waiver of federal sovereign immunity against awards of money damages for violations of Section 504(a)	10
B. The doctrine that waivers of federal sovereign immunity against money damages must be unequivocally expressed by Congress was not abolished by the Court's ruling in *Franklin* v. *Gwinnett County Public Schools*	25
Conclusion	32
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985)	13
Argentani v. *INS*, 502 U.S. 129 (1991)	11
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	20, 21, 24
Bell v. *Hood*, 327 U.S. 678 (1946)	30
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	30
Block v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983)	31

Cases—Continued: Page

Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994) 23
Clark v. *Skinner*, 937 F.2d 123 (4th Cir. 1991) 27
Consolidated Rail Corp. v. *Darrone*, 465 U.S. 624 (1984) 28-29
Cousins v. *Secretary of United States Dep't of Transp.*, 880 F.2d 603 (1st Cir. 1989) 27
Dellmuth v. *Muth*, 491 U.S. 223 (1989) 22
Doe v. *Attorney General of United States*, 941 F.2d 780 (9th Cir. 1991) 6, 7, 17, 23
Dooley v. *United States*, 182 U.S. 222 (1901) 30
Dorsey v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994) 6, 7, 12, 14, 27
Edelman v. *Jordan*, 415 U.S. 651 (1974) 28
FDIC v. *Meyer*, 114 S. Ct. 996 (1994) 30
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 17
Franchise Tax Bd. v. *United States Postal Serv.*, 467 U.S. 512 (1984) 11
Franklin v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) 8, 9, 26, 27
Grove City College v. *Bell*, 465 U.S. 555 (1984) 22
Guardians Ass'n v. *Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983) 9
Keifer & Keifer v. *Reconstruction Fin. Corp.*, 306 U.S. 381 (1939) 11
Kendall v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) 30
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 11, 12
Library of Congress v. *Shaw*, 478 U.S. 310 (1986) 8, 11
Miener v. *Missouri*, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909, 916 (1982) 26

Cases—Continued: Page

North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 13
Public Employees Retirement Sys. v. *Betts*, 492 U.S. 158 (1989) 23
Soriano v. *United States*, 352 U.S. 270 (1957) 11
United States v. *Baylor Univ. Medical Ctr.*, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985) 20
United States v. *Clarke*, 33 U.S. (8 Pet.) 436 (1834) 10
United States v. *Eckford*, 73 U.S. (6 Wall.) 484 (1867) 10
United States v. *King*, 395 U.S. 1 (1969) 11
United States v. *Mitchell*, 445 U.S. 535 (1980) 11
United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 7, 8, 10, 11, 12, 18, 24, 28
United States v. *Sherwood*, 312 U.S. 584 (1941) .. 10, 11
United States v. *Testan*, 424 U.S. 392 (1976) 10
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) 10
United States v. *Williams*, 115 S. Ct. 1611 (1995) ... 12
United States Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 28
Women's Equity Action League v. *Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) 16, 20

Constitution, statutes and rule:

U.S. Const. Amend. XI 23
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* .. 27
5 U.S.C. 702 28
Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* 16, 22
§ 303, 42 U.S.C. 6102 ..... 3, 5a

Statutes and rule—Continued: Page

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 12
Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 ..... 3, 13
Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
Tit. VI, 42 U.S.C. 2000d *et seq.* 9, 10, 13, 15, 21, 22
42 U.S.C. 2000d 3, 13, 4a
Tit. VII, 42 U.S.C. 2000e *et seq.* 12, 18, 25
42 U.S.C. 2000e-5(g)(1) (Supp. V 1993) 25
Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072-1073 ..... 3, 18, 25
42 U.S.C. 1981a(a)(2) (Supp. V 1993) 18, 25, 6a
42 U.S.C. 1981a(b)(1) (Supp. V 1993) 18, 7a
42 U.S.C. 1981a(b)(2) (Supp. V 1993) 18, 25, 7a
Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28:
§ 2, 102 Stat. 28 22
§ 4, 102 Stat. 29-30 22
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 9, 10, 13, 16, 21, 22, 27
§ 901, 20 U.S.C. 1681 3
§ 901(a), 20 U.S.C. 1681(a) 13, 4a
Maritime Education and Training Act of 1980, 46 U.S.C. App. 1295 *et seq.* 5
Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619 13
29 U.S.C. 706(6) (1976) 13
Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807:
§ 1003, 100 Stat. 1845 20
§ 1003(a), 100 Stat. 1845 ..... 2, 21
42 U.S.C. 2000d-7(a) 2, 21
§ 1003(a)(1), 100 Stat. 1845 ..... 21, 22
§ 1003(a)(2), 100 Stat. 1845 ..... 21, 22
Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344:
§ 102(p)(32), 106 Stat. 4360 23
§ 506, 106 Stat. 4428 23

Statutes and rule—Continued: Page

Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 13
Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.* 7
§ 501, 29 U.S.C. 791 ..... 17, 18, 20, 25, 29
§ 501(b), 29 U.S.C. 791(b) 2, 1a
§ 504, 29 U.S.C. 794 (1976) 12, 13
§ 504, 29 U.S.C. 794 (1982) 14
§ 504, 29 U.S.C. 794 (Supp. V 1993) ..... *passim*
§ 504(a), 29 U.S.C. 794(a) (Supp. V 1993) ..... *passim*
§ 505, 29 U.S.C. 794a 15, 17, 23
§ 505(a)(1), 29 U.S.C. 794a(a)(1) 2, 17, 18, 2a
§ 505(a)(2), 29 U.S.C. 794a(a)(2) 2, 9, 15, 16, 17, 18, 19, 2a
§ 505(b), 29 U.S.C. 794a(b) 2, 19, 2a
Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955:
§ 119, 92 Stat. 2982 14
§ 120(a), 92 Stat. 2982 18
§ 120(a), 92 Stat. 2983 ..... 15, 19
5 U.S.C. 101 14
5 U.S.C. 103 14
5 U.S.C. 104 14
5 U.S.C. 105 14
Fed. R. App. P. 42(b) 5

Miscellaneous:

134 Cong. Rec. S16,608-S16,609 (daily ed. Oct. 5, 1992) 23
H.R. Conf. Rep. No. 955, 99th Cong., 2d Sess. (1986) 20
S. Rep. No. 1297, 93d Cong., 2d Sess. (1974) 13
S. Rep. No. 890, 95th Cong., 2d Sess. (1978) 29
S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 20
S. Rep. No. 64, 100th Cong., 1st Sess. (1987) 22

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) summarily affirming the district court order denying compensatory damages is not reported. The district court order denying compensatory damages (Pet. App. 5a-10a) is not reported. The earlier opinion and order of the district court regarding liability and other remedies (Pet. App. 11a-63a) is reported at 867 F. Supp. 1050.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. The petition for a writ of certiorari was filed on September 5, 1995 (a Tuesday following a legal holiday), and was granted on January 5, 1996 (116 S.

Ct. 689). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 504(a) of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 794(a) (Supp. V 1993), provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Other pertinent provisions of the Rehabilitation Act, §§ 501(b), 505(a)(1) and (2), and 505(b), 29 U.S.C. 791(b), 794a(a)(1) and (2), and 794a(b) (1988 & Supp. V 1993), are reprinted at App., *infra*, 1a-2a.

2. Section 1003(a) of the Rehabilitation Act Amendments of 1986, 42 U.S.C. 2000d-7(a), is reprinted at App., *infra*, 3a.

3. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, is reprinted at App., *infra*, 4a.

4. Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681, is reprinted at App., *infra*, 4a.

5. Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. 6102, is reprinted at App., *infra*, 5a.

6. Section 102 of the Civil Rights Act of 1991, 42 U.S.C. 1981a (Supp. V 1993), is reprinted in pertinent part at App., *infra*, 5a-7a.

STATEMENT

1. This suit arose as a result of petitioner's separation from the United States Merchant Marine Academy (Academy) in December, 1992. The Academy is a federal service academy that trains men and women to serve as commercial merchant marine officers and as commissioned officers in the United States armed forces. The Academy is administered by the Maritime Administration, an organization within the Department of Transportation. Pet. App. 15a & n.3.

Petitioner applied for an appointment to the Academy in 1990. After passing a physical examination conducted by the Department of Defense and meeting the Academy's other requirements for appointment, petitioner entered the Academy in July, 1991. Pet. App. 15a-16a. After his enrollment, a private physician discovered that petitioner had diabetes mellitus. *Id.* at 16a. When the Academy was informed of the diagnosis, *id.* at 16a-17a, it convened a hearing before the Academy's Physical Examination Review Board. The Board confirmed petitioner's condition and advised the Academy Superintendent that petitioner had insulin-dependent diabetes, a disqualifying condition for military service under United

States Navy commissioning standards. The Board stated that there was also a question regarding Coast Guard licensing because, although the Coast Guard's merchant marine licensing requirements are less rigid than the requirements for military service, a waiver is required for an insulin-dependent applicant; such a waiver depends on the specifics of the condition. *Id.* at 17a.

The Academy Superintendent then advised petitioner that diabetes disqualified him for military service, rendering him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program or as a Naval Reserve officer. Pet. App. 17a-18a. The Superintendent notified petitioner that he would be separated from the Academy in December, 1992, at the end of the semester. *Id.* at 18a. Petitioner contacted the then-Administrator of the Maritime Administration to challenge the Superintendent's decision.

The Administrator reviewed the matter and permitted petitioner a further opportunity to demonstrate that he was physically eligible for a Coast Guard license and a reserve officer's commission. Pet. App. 19a; Exh. 11 to Pltf.'s Mot. for Prelim. Inj. Ultimately, the Administrator informed petitioner that he had not demonstrated that he met the Academy's physical qualifications because "insulin dependent diabetes disqualifies an individual from receiving a commission in any component of the reserve of the armed forces of the United States." Pet. App. 19a. The Administrator stated that the Maritime Administration had long interpreted the statutory requirements for appointment to the Academy to require that candidates for admission to, and midshipmen at, the Academy meet the physical

requirements for reserve officers established by the Department of the Navy. Exh. 13 to Pltf.'s Mot. for Prelim. Inj. 4. The Administrator concluded that petitioner would not be readmitted to the Academy until he could show that he met those standards. *Id.* at 5.

2. Petitioner filed suit in the United States District Court for the District of Columbia against the Secretary of Transportation and other federal officials, in their official capacities, contending that his dismissal from the Academy violated the Maritime Education and Training Act of 1980, 46 U.S.C. App. 1295 *et seq.*, and Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a) (Supp. V 1993). Pet. App. 12a. Section 504(a) protects an "otherwise qualified" individual from discrimination based on a disability in, inter alia, any program or activity conducted by a federal executive agency. 29 U.S.C. 794(a) (Supp. V 1993). Petitioner sought immediate reinstatement to the Academy, compensatory damages (including out-of-pocket expenses, loss of professional opportunity, and pain and suffering), attorneys' fees, and costs. Pet. App. 12a.

On October 26, 1994, the district court granted summary judgment for petitioner and ordered his immediate reinstatement. Pet. App. 11a-63a.[1] The court concluded that the Maritime Education and Training Act of 1980, 46 U.S.C. App. 1295 *et seq.*, "does not contain a clear statutory requirement that every

[1] The federal defendants initially filed an appeal from the district court's grant of injunctive relief to petitioner, but that appeal was later dismissed pursuant to Federal Rule of Appellate Procedure 42(b). See J.A. 28-30. Whether a violation of the Rehabilitation Act occurred is not at issue in this case.

cadet both serve in, and at all times meet physical qualifications for, commissioning in the armed forces reserve," and that, therefore, respondents were not obliged to separate petitioner from the Academy for failure to meet such physical requirements. Pet. App. 26a, 28a-49a. The court also ruled that respondents had violated Section 504 of the Rehabilitation Act by disenrolling petitioner solely on the basis of his diabetes mellitus, without attempting a reasonable accommodation or making an individualized determination. *Id.* at 27a, 49a-56a. Petitioner subsequently re-enrolled at the Academy and resumed his studies. Pet. Br. 6 n.2.

In its October 26 order, the district court also ruled that petitioner was entitled to compensatory damages under Section 504(a) of the Rehabilitation Act. Pet. App. 57a-60a. On December 16, 1994, however, the District of Columbia Circuit held, in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551, that the Rehabilitation Act does not waive the federal government's sovereign immunity against awards of money damages for violations of Section 504(a).[2] The D.C. Circuit acknowledged in *Dorsey* that its ruling conflicts with the Ninth Circuit's ruling in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (1991). *Dorsey*, 41 F.3d at 1552-1553, 1555 (J.A. 22, 26).[3] In *Doe*, the Ninth Circuit had held that compensatory damages for Section 504(a) violations are available

[2] The D.C. Circuit's opinion in *Dorsey* is reproduced in the Joint Appendix at J.A. 21-27.

[3] On November 27, 1995, the Attorney General and other federal parties filed a petition for a writ of certiorari in *Doe*, suggesting that the Court hold the petition pending disposition of the instant case. *Reno* v. *Doe*, No. 95-830.

against all defendants, including the federal government. 941 F.2d at 794-795. The D.C. Circuit disagreed, ruling that sovereign immunity barred recovery of monetary damages against federal executive agencies for their violations of Section 504(a). The *Dorsey* court emphasized that the fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." 41 F.3d at 1555 (J.A. 26-27). The *Dorsey* court recognized that sovereign immunity waivers must be explicit and unambiguous, and it found no such explicit waiver of immunity against money damages in Section 504(a). *Ibid.*, citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). The court also found the legislative history of Section 504(a), on which the *Doe* court relied, to be "at the very best * * * ambiguous" and not a sufficient basis for concluding that Congress had waived sovereign immunity against money damages. 41 F.3d at 1555 (J.A. 27).

In light of *Dorsey*, the district court in this case vacated its prior ruling awarding compensatory damages and entered a new order, ruling that petitioner is not entitled to such relief. Pet. App. 5a-7a. The court of appeals summarily affirmed. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

The language, structure, and history of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, reveal that Congress did not waive the federal government's sovereign immunity against awards of money damages for violations of Section 504(a) of the Act.

Section 504(a) prohibits discrimination based on disability in two settings—in any program or activity receiving federal financial assistance, and in any program or activity conducted by a federal executive agency. 29 U.S.C. 794(a) (Supp. V 1993). In the first setting, where the defendant is a federal fund recipient, this Court's decision in *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992), indicates that monetary damages are available as a remedy for the recipient's discrimination. The Court has never addressed whether monetary damages are available in the second setting, where discrimination occurs in a program or activity conducted by a federal executive agency.

Whether monetary damages are available against a federal defendant under Section 504(a) depends on whether Congress has waived the federal government's sovereign immunity against such a remedy. It is well settled that waivers of sovereign immunity must be unequivocally expressed and will not be implied. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). Waivers of immunity must not be extended beyond what the relevant statutory language requires and, if money damages are sought, any waiver must unambiguously extend to such monetary claims. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). The legislative history of a statute cannot supply a waiver that does not appear unequivocally in the statutory text. *Id.* at 37.

The Rehabilitation Act does not contain a textual waiver of federal sovereign immunity against awards of money damages in cases where a federal executive agency's program or activity violates Section 504(a). The overall structure of the Rehabilitation Act and provisions relating to remedies for violations of

sections other than Section 504(a) confirm that Congress did not, in fact, intend to enact such a waiver. The contemporaneous legislative history further supports that conclusion.

Petitioner urges the Court to find a waiver of federal sovereign immunity based primarily on the argument that Congress did not express an intention to treat federal defendants differently from non-federal defendants, and that damages against federal defendants should therefore be available because the Court has ruled that "all appropriate relief," including monetary damages, is available against non-federal defendants under parallel statutes that apply to federal fund recipients. *Franklin* v. *Gwinnett County Pub. Sch.*, *supra* (Title IX of the Education Amendments of 1972); *Guardians Ass'n* v. *Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964).

Contrary to petitioner's contention, Congress expressly treated federal executive agencies differently from federal fund recipients for purposes of remedies for violations of Section 504(a). See 29 U.S.C. 794a(a)(2) (incorporating Title VI remedies in cases where the discriminator is a federal fund recipient, but not providing for such remedies in cases where the discrimination occurs in a program or activity conducted by a federal executive agency). Case law regarding the remedies available under Title VI and Title IX cannot be applied to cases involving programs or activities conducted by federal executive agencies under Section 504(a) because Title VI and Title IX are only applicable to federal fund recipients.

ARGUMENT

CONGRESS HAS NOT WAIVED THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY AGAINST AWARDS OF MONEY DAMAGES FOR VIOLATIONS OF SECTION 504(a) OF THE REHABILITATION ACT OF 1973

A. The Rehabilitation Act Does Not Provide The Unequivocal Statutory Statement Required To Accomplish A Waiver Of Federal Sovereign Immunity Against Awards Of Money Damages For Violations Of Section 504(a)

1. The United States can be sued only on matters for which Congress has waived sovereign immunity. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Eckford*, 73 U.S. (6 Wall.) 484, 490 (1867) ("no action of any kind could be sustained against the government for any supposed debt, unless by its own consent"); *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834). Executive officials cannot waive federal sovereign immunity; any waiver must be based on "affirmative statutory authority" from Congress. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940). Moreover, the legislative history of a statute may not supply the requisite waiver; "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon is an expression in statutory text." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Nor can a waiver of sovereign immunity be found in the general purposes of a statute, *United States* v. *Testan*, 424 U.S. 392, 399-400 (1976), or in

policy considerations underlying the statute, *Library of Congress* v. *Shaw*, 478 U.S. 310, 320-321 (1986).[4]

Like a waiver of immunity itself, which must be "unequivocally expressed," *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), a waiver of immunity to a particular remedy also "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); see *United States* v. *Sherwood*, 312 U.S. at 590-591 (statutory language should be construed conservatively and not to extend a waiver beyond the limits marked by the government's consent to suit). The "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (where sovereign immunity has been waived, such waiver must be strictly construed in the government's favor and may not be enlarged to permit actions beyond what the statute requires); see, *e.g.*, *Library of Congress* v. *Shaw*, *supra* (waiver of

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[4] In asserting that the scope of a federal sovereign immunity waiver can be ascertained by reference to the underlying congressional policy (see Pet. Br. 11-12 & n.7, 24; *id.* at 28), petitioner relies on cases involving "sue and be sued" clauses of government corporations or similar entities. See *Franchise Tax Bd.* v. *United State Postal Serv.*, 467 U.S. 512, 517-521 (1984); *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939). But as *Nordic Village* made clear, cases dealing with "sue and be sued" clauses "do not * * * eradicate the traditional principle" that, in other types of cases, the government's consent to suit must be strictly construed and not enlarged beyond what the statutory language requires. 503 U.S. at 34.

government's immunity from suits under Title VII of the Civil Rights Act of 1964 and awards of attorneys' fees did not extend to awards of interest); *Lehman* v. *Nakshian*, *supra* (waiver of immunity from suit under the Age Discrimination in Employment Act of 1967 did not waive immunity from jury trial).

The Court recently reaffirmed that, to permit the recovery of money damages from the government, a waiver of immunity must unambiguously extend to monetary claims. *United States* v. *Nordic Village, Inc.*, 503 U.S. at 33-34, 39. If a statute waiving immunity can plausibly be read not to impose monetary liability on the federal government, money damages are not authorized. *Id.* at 34, 37; see also *United States* v. *Williams*, 115 S. Ct. 1611, 1616 (1995) (any ambiguities in waiver must be resolved in favor of sovereign immunity).

2. The court of appeals correctly ruled in the instant case and in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994) (J.A. 21-27), that Congress did not provide the requisite unequivocal waiver of the federal government's sovereign immunity against money damage awards so as to authorize recovery of damages against the government for violations of Section 504(a) of the Rehabilitation Act.

a. As originally enacted in 1973, Section 504 of the Rehabilitation Act provided that

> [n]o otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394. The text of this initial version of Section 504 was modeled on the text of Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, which prohibits discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. See *Alexander* v. *Choate*, 469 U.S. 287, 293 n.7 (1985). The text of Section 504 as originally enacted also mirrored the language of Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a).[5] Title IX had itself been modeled on Title VI and was expected to be interpreted consistently with Title VI. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 514 (1982).

b. The relevant text of Section 504 remained as originally enacted until 1978.[6] In that year, Congress amended Section 504 so that it was no longer limited to prohibiting handicap discrimination by recipients of federal funds. Congress extended the nondiscrimination provision of Section 504 to prohibit handicap discrimination "under any program or activity

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[5] See S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974) ("Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 * * *, and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683").

[6] In 1974, Congress amended other aspects of the Rehabilitation Act not directly at issue here, most notably the definition of "handicapped individual" to clarify that the definition did not relate merely to an individual's employability. See Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619, codified at 29 U.S.C. 706(6) (1976).

conducted by any Executive agency or by the United States Postal Service." Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (RCSDDA), Pub. L. No. 95-602, § 119, 92 Stat. 2982, codified at 29 U.S.C. 794 (1982).[7] The amendment directed the federal executive agencies to promulgate implementing regulations. *Ibid.*

The 1978 amendment of Section 504 clearly did not, by its terms, waive the federal government's sovereign immunity against awards of money damages for violations of its statutory obligation not to discriminate on the basis of handicap. None of the materials cited by petitioner (Pet. Br. 17) indicates otherwise. The statements by legislators in 1978 on which petitioner relies addressed the general obligation of nondiscrimination imposed on federal executive agencies, but "uttered not a word about relinquishing the government's immunity from damages." *Dorsey* v. *United States Dep't of Labor*, 41 F.3d at 1555 (J.A. 27).

Petitioner nevertheless argues that the 1978 amendment to Section 504 reflected a congressional intention that all remedies available against private defendants under Section 504, including money damages, would also be available against federal executive agencies. Petitioner premises this argument on his assertions (Pet. Br. 10, 14-15, 19, 20-21, 26, 29, 31, 36) that Congress intended to place federal defendants on an "equal footing" with all other defendants, treating federal defendants "identically" to non-federal defendants. Petitioner claims that Congress nowhere expressed any intention to treat federal agencies differently from non-federal defendants, against whom monetary damages can be recovered under Section 504(a).

[7] "Executive agency," is defined in 5 U.S.C. 101, 103, 104, and 105 to include federal executive agencies, including the Department of Transportation, as well as government corporations and independent establishments in the executive branch.

Petitioner's argument for identical treatment of federal defendants and non-federal defendants in Section 504(a) cases is unpersuasive. Contrary to petitioner's premise that Congress intended identical treatment for federal and non-federal defendants, Congress expressly revealed its intention to treat federal executive agencies differently from other Section 504(a) defendants for purposes of remedies. Thus, at the same time that Congress made "any program or activity conducted by any Executive Agency" subject to Section 504, it also added Section 505 to the Act explicitly to address remedies. With regard to remedies for Section 504 violations, Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act *by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.*

RCSDDA § 120(a), 92 Stat. 2983, codified at 29 U.S.C. 794a(a)(2) (emphasis added). Congress thus provided that Title VI remedies should be available against recipients of federal financial assistance and the federal providers of such assistance. The statute does not, however, make those remedies available to persons discriminated against under activities that are themselves "conducted by any Executive agency." By extending the remedial provision of Section

505(a)(2) only to the funding activities of federal agencies, while extending the nondiscrimination obligation of Section 504 to programs and activities conducted by such agencies, Congress explicitly treated federal executive agencies differently from federal fund recipients for remedial purposes.[8] Regardless of the remedies available against federal fund recipients for violations of Section 504, the 1978 amendment to Section 504 and the addition of Section 505 did not waive federal sovereign immunity against money damages for violations of Section 504(a) committed by federal executive agencies themselves.[9]

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[8] It would have been odd for Congress to have provided that Title VI remedies applied in Section 504 cases involving discrimination by executive agencies because Title VI does not prohibit discrimination in programs or activities conducted by executive agencies. To the extent that Title VI (and other federal statutes placing obligations on federal fund recipients, such as Section 504, as initially enacted, Title IX, and the Age Discrimination Act of 1975) applies to federal agencies as providers of funds to non-federal programs or activities that discriminate, federal executive agencies may, according to some courts, be subject to injunctive relief and attorneys' fees. The remedy in such cases is "one directed primarily toward the fund recipient, not the funding agency." *Women's Equity Action League* v. *Cavazos*, 906 F.2d 742, 748 & n.6, 749 & n.9, 750 (D.C. Cir. 1990) (Ginsburg, R., J.) (refusing to find implied cause of action for suit seeking continued federal court supervision of federal officials charged with monitoring recipients of federal funds under Title VI, Section 504(a), and other federal statutes, but noting that remedies may be available against federal funding agency in recipient-specific cases). Courts are divided about whether to permit actions for injunctions against the federal funding agency in such circumstances. See *id.* at 749 (citing cases).

[9] Contrary to petitioner's claim (Pet. Br. 30-31), Congress's coverage of the activities of federal executive agencies

Congress's inclusion of federal agencies in Section 505(a)(2) only in their capacity as funding agencies was not a drafting error, as the Ninth Circuit has suggested. See *Doe* v. *Attorney General of United States*, 941 F.2d 780, 787 n.13 (1991). In Section 505(a)(1), which immediately precedes, and was enacted contemporaneously with, Section 505(a)(2), Congress expressly waived sovereign immunity against certain remedies for Rehabilitation Act violations by federal defendants. Section 505(a)(1) specifies the remedies available for violations of Section 501, which prohibits disability discrimination in employment decisions by the federal government. Section 505(a)(1) provides in relevant part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) [the provisions of Title VII that govern employment by the federal government], including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) [the provisions of Title VII detailing remedies available in a civil action against the government for employment discrimination], shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employ-

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in Section 504 was not sufficient under *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), to waive the government's immunity against damages for violation of the Act. In *Fitzpatrick*, there was an explicit remedial provision of the statute making back pay available against a "respondent" and it was clear that States were respondents under the Act. Here Congress did not include in its new remedial provision (Section 505) any reference to cases involving discrimination in programs or activities conducted (as opposed to funded) by federal executive agencies.

> ment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

RCSDDA § 120(a), 92 Stat. 2982, codified at 29 U.S.C. 794a(a)(1). Congress thus waived immunity with regard to the identified Title VII remedies for purposes of "any complaint under section 501."[10] If Congress had similarly intended to treat all defendants alike under Section 504 for purposes of remedy, it presumably would have used similar language in Section 505(a)(2) and made Title VI remedies available there with respect to "any complaint under section 504."[11]

Finally, Congress's addition of an attorneys' fees provision in the Rehabilitation Act in 1978 does not show that it waived the federal government's immunity against monetary damages for violations of Section 504(a). The attorneys' fees provision addresses

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[10] The remedies for Section 501 violations did not include compensatory damages in 1978. In 1991, however, Congress waived sovereign immunity against compensatory (but not punitive) damages in cases of intentional discrimination under Section 501. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, 1073, codified at 42 U.S.C. 1981a(a)(2), (b)(1) and (2) (Supp. V 1993). See pages 24-25, *infra*.

[11] This case is similar to *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). The Court there held that the fact that Congress treated three different categories of claims differently—waiving immunity against monetary relief in two of those categories but not in the third—made it all the more apparent that it intended not to waive immunity against monetary relief in the category that did not contain waiver language.

only fees, not the availability of money damages. It provides:

> In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

RCSDDA § 120(a), 92 Stat. 2983, codified at 29 U.S.C. 794a(b). Petitioner contends (Br. 20-21) that, because Congress clearly expressed an intent in this section to treat the United States differently from other parties (by allowing all prevailing parties other than the United States to recover attorneys' fees), the Court should not distinguish among parties with regard to remedies under Section 504(a), where Congress did not express such an intention. As demonstrated above, however, Congress *did* express an intention to distinguish between parties with regard to remedies under Section 504. Congress limited Section 505(a)(2) to cases involving actions against recipients of federal assistance and the federal providers of the assistance, and did not include cases involving programs or activities conducted by federal executive agencies in the new remedial provision.[12]

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[12] The attorneys' fees provision states that the United States can be a prevailing party in actions under Title V of the Rehabilitation Act. That provision does not establish that Congress understood that the United States would be amenable to suits for damages based on Section 504(a) violations that occur in activities or programs conducted by federal executive agencies. There are at least three ways in which the United States can be a prevailing party in actions under Title V of the Act that do not involve suits for damages against the United

c. The 1986 amendments to the Rehabilitation Act also do not provide a waiver of federal sovereign immunity against actions for damages under Section 504(a). To the contrary, these amendments illustrate that Congress knew how to waive such immunity unequivocally when it wished to do so and that Congress did not do so with regard to actions for damages under Section 504(a).

Section 1003 of the 1986 Act was enacted in direct response to the decision by the Court in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), that Congress had not waived the sovereign immunity of the States against actions in federal court for money damages under Section 504. See S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986); H.R. Conf. Rep. No. 955, 99th Cong., 2d Sess. 78-79 (1986). In *Atascadero*, the Court held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

States under Section 504(a): (1) The United States can be sued under Section 501, which prohibits disability discrimination in employment by the federal government. (2) The United States is authorized to bring actions against federal fund recipients related to its enforcement responsibilities under Section 504(a). See, *e.g.*, *United States* v. *Baylor Univ. Medical Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985). (3) The United States may be a defendant in cases where plaintiffs seek injunctive relief against non-federal programs funded by the United States that violate Section 504(a). See *Women's Equity Action League* v. *Cavazos*, 906 F.2d at 750 (Ginsburg, R., J.) (federal agency that provides funds to violator of Section 504(a) could be liable under that section, including for attorneys' fees).

473 U.S. at 242. The Court examined the text of the Rehabilitation Act and did not find such language.

Section 1003(a) of the Rehabilitation Act Amendments of 1986 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution * * * from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

Pub. L. No. 99-506, 100 Stat. 1845, codified at 42 U.S.C. 2000d-7(a).

Relying upon the reference in Section 1003(a)(2) to "any public or private entity other than a State," petitioner argues that this text reflects the fact that federal executive agencies must be subject to the same remedies under Section 504(a) as are private entities, including monetary damages. See Pet. Br. 21-22 & n.20. Section 1003(a)(2), however, applies only to remedies available for violation of statutes referred to in Section 1003(a)(1), *i.e.*, statutes that prohibit discrimination by recipients of federal financial assistance, including Section 504, Title VI, Title IX,

and the Age Discrimination Act of 1975. It is thus likely that the "public entities" to which Congress referred in Section 1003(a)(2) are not federal entities, but are the non-federal public entities receiving federal financial assistance that are covered by all of those statutes—*i.e.*, local school districts, municipal hospitals, local governmental units.

This reading of Section 1003(a)(2) is supported by the circumstances surrounding the enactment of that provision. With the Court's ruling in *Atascadero* as its guide, Congress in Section 1003(a)(1) and (2) met the unequivocal-statement standard for waiving the States' sovereign immunity against suit for specific remedies. If Congress had similarly intended to effectuate such a waiver for the federal government it would have used similarly unequivocal language. It would have been odd for Congress, taking careful stock of the state of sovereign immunity law, to "drop coy hints but stop short of making its intention manifest." *Dellmuth* v. *Muth*, 491 U.S. 223, 230-231 (1989).

d. Petitioner errs in claiming (Pet. Br. 23-24) that the 1992 amendments to the Rehabilitation Act constitute a waiver of federal sovereign immunity against money damages for violations of Section 504(a).[13] In those amendments, Congress made no

[13] Congress also amended Section 504 in 1988. Congress acted at that time to overturn the Court's ruling in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), which had construed narrowly the phrase "program or activity" as used in Title IX, as well as in Section 504, Title VI, and the Age Discrimination Act of 1975. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §§ 2, 4, 102 Stat. 28, 29-30 (1988); see S. Rep. No. 64, 100th Cong., 1st Sess. 2-7 (1987). The 1988 amendments resulted in

change in Section 505 and, with regard to Section 504(a), simply replaced the term "handicap" with the term "disability" and added a subsection regarding standards to be applied in employment cases. See Pub. L. No. 102-569, §§ 102(p)(32), 506, 106 Stat. 4360, 4428.

Petitioner relies on the 1992 statement of one member of Congress, Senator Jeffords, in attempting to establish Congress's intention in amending Section 504 some 14 years earlier. In his statement, Senator Jeffords expressed his agreement with the Ninth Circuit's decision in *Doe* v. *Attorney General of United States*, *supra*, and his belief that Congress had intended in 1978 to create a private cause of action against federal executive agencies. See Pet. Br. 24; 134 Cong. Rec. S16,608-S16,609 (daily ed. Oct. 5, 1992). However, petitioner does not cite any statement by Senator Jeffords or anyone else that identifies the requisite unequivocal statutory waiver of immunity against money damages.[14] In all events, "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994), quoting *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 168 (1989). The Court also has previously rejected more contemporaneous, but similarly isolated, statements by Senator Jeffords

placing the general discrimination prohibition (previously Section 504) in Section 504(a).

[14] Senator Jeffords' statement in 1992 that there was no need to amend the Act because the 1978 language was sufficient to provide for a waiver (see Pet. Br. 24) takes no account of the Court's ruling in *Atascadero* and Congress's amendments in 1986 to waive the States' Eleventh Amendment immunity.

in connection with whether Section 504 waived State immunity. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. at 251 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

e. The overall structure and history of the Rehabilitation Act support the court of appeals' refusal to find a waiver of immunity against claims of money damages for violations of Section 504 by federal executive agencies. This Court has already rejected the argument that the structure of the Act reflects a congressional intent that all Section 504(a) defendants be treated alike. In *Atascadero*, involving an earlier version of the same Act, the Court expressly ruled that Congress did not eliminate all legal distinctions among Section 504 defendants:

> [G]iven their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

473 U.S. at 246. That statement is equally applicable to asserted waivers of the federal government's sovereign immunity. See *United States* v. *Nordic Village, Inc.*, 503 U.S. at 34. As in *Atascadero*, in order to agree with petitioner in this case, the Court would have to modify its requirement that waivers of sovereign immunity against money damages be unequivocally expressed.

Perhaps the strongest evidence of congressional intent in this case is the fact that Congress has unequivocally twice waived federal sovereign immunity against certain monetary relief for violations of

Section 501 of the Rehabilitation Act. As discussed above, in its 1978 amendments, Congress did so by expressly authorizing certain Title VII remedies against the government for employment discrimination based on disability. Back pay was among those Title VII remedies made available in 1978. See 42 U.S.C. 2000e-5(g)(1) (Supp. V 1993). Before 1991, however, Title VII was not interpreted as providing for awards of compensatory damages against the government. In the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, Congress explicitly authorized such damages as a remedy for intentional employment discrimination by the federal government in violation of Section 501. 42 U.S.C. 1981a(a)(2) (Supp. V 1993).[15] In that legislation, Congress thus waived, in the required unmistakable language, the government's immunity against actions seeking compensatory damages for violations of Section 501. Congress has taken no such action with regard to remedies in Section 504(a) cases involving programs or activities conducted by federal executive agencies.

B. The Doctrine That Waivers Of Federal Sovereign Immunity Against Money Damages Must Be Unequivocally Expressed By Congress Was Not Abolished By The Court's Ruling In *Franklin* v. *Gwinnett County Public Schools*

Petitioner urges the Court to find a waiver in this case by contending that the Court abandoned its long-standing unequivocal-statement rule when it held in

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[15] Because back pay was already authorized, the 1991 statute specifically excludes from compensatory damages "backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. 2000e-5(g)]." 42 U.S.C. 1981a(b)(2) (Supp. V 1993).

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71. Petitioner argues that, under *Franklin*, there is a "presumption that unless Congress expressly provides to the contrary, it intends 'all appropriate remedies' to be available, including money damages, when it creates a cause of action to vindicate federal statutory rights." Pet. Br. 10; see also *id.* at 18-19. Petitioner claims that this presumption applies even in suits for money damages against the federal government and that Congress adopted the all-remedies rule described in *Franklin* when it added federal executive agencies to Section 504 in 1978 (see *id.* at 12, 18-19, 20), when it once again amended the Act in 1986 (see *id.* at 23), and when it again amended the Act in 1992 (see *ibid.*).[16]

In *Franklin*, the suit was based on an implied private right of action against non-federal defendants

[16] The lower court opinions prior to 1986 allowing damages under Section 504(a) (Pet. Br. 22 n.19) do not support the inference that Congress's awareness of these opinions when it reenacted Section 504 evidences an intent to permit damages against federal defendants. Those cases did not involve discrimination in programs or activities conducted by federal executive agencies and did not address any federal sovereign immunity issues. Moreover, one of those cases, *Miener* v. *Missouri*, 673 F.2d 969, 977-978 (8th Cir.), cert. denied, 459 U.S. 909, 916 (1982), involved a State claiming sovereign immunity. The *Miener* court recognized that sovereign immunity is relevant with regard to remedies under Section 504; the court found the State immune despite the fact that it ruled that other recipients of federal funds were liable for damages.

under Title IX. The Court held that monetary damages were available as a remedy. The Court invoked "the traditional presumption in favor of all available remedies" and found no indication of any congressional intent to limit the remedies available to a plaintiff in such a case. 503 U.S. at 72.

Petitioner contends that, once it is established that a cause of action against the government exists under Section 504(a), a damages remedy "follows" under *Franklin*.[17] Pet. Br. 19 n.16. All available remedies

[17] Petitioner asserts a private right of action against the federal government under Section 504(a). Prior to 1978, four courts of appeals had held that Section 504 could be enforced through a private right of action. See Pet. Br. 17-18 & n.14; see also *id.* at 15 & n.12. None of those cases, however, involved suits under Section 504 alleging discrimination in a program or activity conducted by a federal executive agency. The First Circuit has held that actions such as petitioner's are effectively a request for review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and not an exercise of an implied private right of action under Section 504. *Cousins* v. *Secretary of United States Dep't of Transp.*, 880 F.2d 603, 605 (1989) (en banc) (Breyer, J.); accord *Clark* v. *Skinner*, 937 F.2d 123, 125-126 (4th Cir. 1991).

The D.C. Circuit did not address the issue of the source of petitioner's cause of action in its summary affirmance in this case. Pet. App. 1a-2a. In *Dorsey*, the D.C. Circuit also found no need to resolve the cause of action issue because, "[e]ven if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government." 41 F.3d at 1554-1555 (J.A. 26). The fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." *Id.* at 1555 (J.A. 26-27). In our view, resolution of the source of the cause of action, be it under Section 504(a) directly or the APA, would

do not, however, naturally follow in a case where federal sovereign immunity is invoked.

Where a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity has been expressly waived. See *United States* v. *Nordic Village, Inc.*, 503 U.S. at 33-37. Subjecting a governmental entity to the substantive or procedural requirements of a statute does not necessarily mean that sovereign immunity has been waived with respect to claims for damages. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 628 (1992) (federal agency subject to procedural requirements of certain federal environmental statutes, but immune from actions for monetary relief); cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (State's officers can be subject to prospective injunctive relief even though State is immune from damages).

Franklin contains no discussion of sovereign immunity concerns. The Court did not give any hint that its decision was meant to eviscerate the principles of sovereign immunity against monetary damages rearticulated by the Court just one day earlier in *Nordic Village*. It is implausible that, on the day after it decided *Nordic Village*, the Court would *sub silentio* overrule that decision in *Franklin*.

Petitioner errs in suggesting (Pet. Br. 14, 19 n.17) that the government's position is inconsistent with the ruling in *Consolidated Rail Corp.* v. *Darrone*,

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not alter the outcome of this case. The waiver of federal sovereign immunity in the APA is limited to an action "seeking relief other than money damages." 5 U.S.C. 702.

465 U.S. 624 (1984), that back pay is available to a private plaintiff in an action under Section 504(a) against a non-federal defendant. Petitioner argues (Pet. Br. 14 & n.11, 19 n.17) that there must be a waiver of federal sovereign immunity under Section 504(a) for damages against federal executive agencies because, in *Darrone*, the Court stated that "Congress clearly intended to make backpay available to victims of discrimination by the Federal Government." 465 U.S. at 631 n.10, citing S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). Petitioner, however, misconstrues the import of the *Darrone* Court's citation to the Senate Report's reference to the availability of back pay. The report discusses the availability of back pay against the federal government under Section 501, where there is an express waiver of sovereign immunity against such a remedy, not the availability of such relief against the government under Section 504. See S. Rep. No. 890, *supra*, at 19.[18]

Petitioner contends that *Franklin* should control here because the authorities on which the Court relied there involved claims against federal officers. See Pet. Br. 19, 23, 32-34. Those authorities, however, do not establish the applicability of *Franklin* to suits for monetary damages against the United States. In

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[18] The brief of one of petitioner's *amici* also appears to confuse Section 504 and Section 501. American Diabetes Association Amicus Br. 12-13. The brief refers to a settlement entered into by the Department of Treasury and an individual based on allegations of disability discrimination in violation of the Rehabilitation Act. It points to the fact that the settlement included payment by the government of compensatory damages. That case was brought under Section 501 of the Act, not under Section 504, however, and related to adverse employment action by the Department.

Bell v. *Hood*, 327 U.S. 678 (1946), the Court held that injunctive relief may be available against the federal government for constitutional violations, but reserved the question of the availability of damages.[19] In *Dooley* v. *United States*, 182 U.S. 222 (1901), the principal issues concerned whether the Court of Claims had jurisdiction over a cause of action for recovery of previously paid customs duties and whether the action sounded in tort. *Id.* at 224. In holding that the Court of Claims had jurisdiction, the Court stated that "a liability created by statute without a remedy may be enforced by a common-law action." *Id.* at 229. Here petitioner is not left without any remedy. In *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), Congress had specifically authorized government payment to mail carriers; the Court held that the court of appeals had jurisdiction to issue a writ of mandamus for that ministerial act. *Id.* at 609, 626. The Court explicitly acknowledged that "[t]he United States could not, of course, be sued, or the claims in any way enforced against the United States, without [its] consent obtained through an act of congress." *Id.* at 611. It found that a special act of Congress "on its face" provided the necessary consent. *Ibid.*

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[19] In *Bell*, it was unclear whether petitioners were seeking damages against federal officials in their personal capacities, or the federal government in its official capacity. 327 U.S. at 684. This Court settled the matter in *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Relying on *Bell*, the Court held that damages were available against federal officials in their personal capacities for violations of clearly established constitutional rights. In *FDIC* v. *Meyer*, 114 S. Ct. 996 (1994), the Court held that there is no *Bivens* action for damages against federal agencies.

In cases where there has been an apparent conflict between the principle of sovereign immunity and other seemingly well-established rules, the Court has uniformly ruled that the latter must yield to the former, not the other way around as petitioner suggests (Pet. Br. 34-38). For example, in *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983), a State sought to avoid the statute of limitations in an action it brought against the United States involving disputed riparian rights. The State invoked "the well-known canon of statutory construction" that statutes of limitations do not apply to States, absent some explicit indication. *Id.* at 288. This Court ruled, however, that the federal government's sovereign immunity must take precedence. *Ibid.*

The same reasoning applies in the instant case. The traditional rule of remedies enunciated in *Franklin* bears a strong resemblance to the canon of construction upon which the State relied in *Block*—both are judicially crafted rules with an established pedigree. The Court in *Block* did not find that a sufficient reason to cast aside longstanding principles requiring strict application of waivers of sovereign immunity. To the extent that this case could similarly be viewed as involving competing principles, the same conclusion is applicable here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Rehabilitation Act of 1973, as amended and codified at 29 U.S.C. 791 *et seq.*, provides, in relevant part:

§ 791. Employment of individuals with disabilities

* * * * *

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

* * * * *

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. Section 1003(a) of the Rehabilitation Act Amendments of 1986, as codified at 42 U.S.C. 2000d-7(a), provides:

§ 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

3. Section 601 of the Civil Rights Act of 1964, as codified at 42 U.S.C. 2000d, provides:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

4. Section 901 of the Education Amendments of 1972, as codified at 20 U.S.C. 1681, provides, in relevant part:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, * * *

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5. Section 303 of the Age Discrimination Act of 1975, as codified at 42 U.S.C. 6102, provides, in relevant part:

§ 6102. Prohibition of discrimination

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

6. Section 102 of the the Civil Rights Act of 1991, as codified at 42 U.S.C. 1981a, provides, in relevant part:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the

complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant

to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

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